IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The International Ladies' Garment Workers' Union, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled case on May 19, 1960.

OPINIONS BELOW

The opinion of the court below (Appendix C, *infra*, pp. 11a-20a) and the dissenting opinion of Circuit Judge Charles Fahy (Appendix D, *infra*, pp. 21a-22a) are not yet reported. The findings of fact, conclusions

of law and order of the National Labor Relations Board (R. 7-22)[1] and the dissenting opinion of Board Member John H. Fanning (R. 22-27) are reported at 122 N.L.R.B. 1289.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 10a) was entered on May 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether settlement of a strike by exclusive recognition of a union in the good faith but mistaken belief that the union had been designated by a majority of the employees in an appropriate unit, is an unfair labor practice by the employer under Section 8 (a) (1) and (2) and by the union under Section 8 (b) (1) (A) of the National Labor Relations Act.

2. Even if Question 1 is answered in the affirmative, whether the collective bargaining agreement entered into subsequent to the settling of the strike and at a time the union had unquestionably been designated by a majority of the employees in an appropriate unit, can properly be held by the Board to be unenforceable by the union and the Board can properly order the employer to withdraw and withhold recognition from the union and the union to cease acting as a collective bargaining representative of any of the employees until it has won a Board conducted election, all solely because of the union's failure to have been designated by a majority when the strike was settled.

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[1] "R." references are to the Joint Appendix filed in the Court of Appeals.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. 1a-9a.

STATEMENT

Bernhard-Altmann Texas Corporation, hereinafter called the Employer, is a Delaware corporation, which is engaged in the manufacture of knit wear at San Antonio, Texas (R. 36-37). In the fall of 1956 its employees began signing authorization cards in the International Ladies' Garment Workers' Union, AFL-CIO, hereinafter called the Union (R. 9, 36; 141-146).[2] In varying numbers employees from October, 1956, to September, 1957, signed cards designating the Union as their representative for purposes of collective bargaining (R. 36; 141-146). No other labor organization was involved in organizing or seeking to represent these employees (R. 37). At all times prior to August 30, 1957, "the Employer vigorously opposed the Union's efforts," and its employees were aware of this opposition (R. 37; 100).

On July 29, 1957, a substantial number of employees went on strike against the Employer because of a wage reduction in the Topping Department (R. 9, 37; 89). Many of the strikers had signed union authorization cards, although some card signers did not participate in the strike, and during the progress of the strike other employees, both strikers and non-strikers, continued to join the Union (R. 62-63, 68-71, 135-136, 141-146).

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[2] References preceding the semicolon are to the Board's findings, including the findings of the Trial Examiner which were adopted by the Board; succeeding references are to the supporting evidence.

During the last week of August, 1957, conferences between representatives of the Employer and the Union, to settle the strike, were held in New York City where the home offices of both the Employer and the Union are located, (R. 9, 37; 91-94). The Employer representatives did not have any copies of the payroll in New York City (R. 66-67, 139). However, on at least two occasions Employer representatives advised the Union "of the number of people whom (sic) they determined would be working for them or eligible to join the union" (R. 94). The exact dates on which this occurred and the number so stated do not appear in the record. At the hearing many months later, it was established that the Employer's payroll for the week ending August 31, 1957 showed 286 employees exclusive of "clericals, plant clericals, watchmen and plant supervisors" (R. 11, 42; 59-60, 65, 129-133). Seven of these 286 were probationary employees on that date (R. 90-91). Some 25 others had been hired during the strike and Employer representatives in New York City assured the Union these were solely temporary (R. 42; 97-100). At this time there were also an undetermined number of employees in lay off status, with the maximum in this group 120, although to the extent that these persons had secured other permanent employment they would not be considered still employees of the company (R. 42; 63-64, 135-136).

The Union representatives had with them in New York City the cards signed by employees authorizing the Union to represent them (R. 92-93). These cards were turned over to the Union's attorney, Morris Glushien, who was then engaged in conferences with Leo Guzik, Employer counsel (R. 92-94). By August

30, 1957 the Union had received 186 cards, all of which were admittedly genuine and valid (R. 68-72, 141-146), although it later turned out that 28 of these cards were signed by employees who were not current employees in the bargaining unit on August 30, 1957 (R. 68-72, 146).

On or about August 30, 1957, in the course of settlement conferences the Union stated to the Employer that it had been designated by a majority of the employees and requested recognition and bargaining rights (R. 94). The Employer agreed to recognize the Union and settle the strike. Both the Union, in making the claim of majority on August 30, and the Employer, in accepting the claim, acted upon the honest and reasonable belief that this claim was true, as the Trial Examiner and Board later found (R. 12, 43-44; 95).

The Employer and the Union executed a short informal written "memorandum of understanding" on August 30, 1957, reciting that the strike was terminated, that the Employer "recognizes the Union as the exclusive bargaining agent for all production and shipping employees," that all striking employees shall return to work without discrimination, that certain improved wages and conditions of employment were granted and that "formal agreement containing these terms" will "be promptly drafted by the attorneys and signed by both parties within the next two weeks" (R. 9, 37; 103-104). There was no mention of any requirement of union membership or any form of union security.

On October 10, 1957, the Employer and the Union executed a formal collective bargaining contract, embodying the terms reached in the strike settlement

(R. 9, 38; 72, 105-127). This contract did not contain any form of union security clause. In this contract the parties for the first time delineated precisely the bargaining unit for which the Employer recognized the Union (R. 97). The contract in this regard provides (R. 106):

> "The bargaining unit covered by this agreement consists solely of all non-supervisory production and shipping department workers employed by said Employer, excluding among others mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truck drivers, engineers, maintenance men, and janitors."

On October 10, 1957, the date upon which the formal collective bargaining contract was executed (R. 72), the Union had been designated as their collective bargaining representative by a majority of the employees in the unit described in the contract (R. 39).[3]

Thereafter charges were filed and a complaint issued alleging that the Employer had committed unfair labor

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[3] The Board made no finding as to how many were in the appropriate unit on either August 30 or October 10. The largest possible number of employees in the agreed upon unit on October 10 could not have exceeded 383, although it was undoubtedly even smaller because of the uncertainty of the various lists which the General Counsel introduced. Assume the maximum from these lists as follows: 287 from G.C. Ex. 4 (R. 59-61, 65-66, 73, 129-133), 120 from G.C. 5 (R. 62-64, 73-74, 135-136), and 12 from the stipulation (R. 71-73). From this, 36 must be subtracted to account for those whom it was stipulated had terminated (R. 100-102). A further deduction should be made to eliminate the 25 temporary employees hired during the strike (R. 42; 97-100) although some of these are probably duplicated in the list of 36 terminations. Even without such further reduction the unit would contain 383, of which the Union had a clear majority of 211 (R. 68-71, 141-146).

practices in violation of Section 8 (a) (1), (2) and (3) of the National Labor Relations Act and that the Union had committed unfair labor practices in violation of Section 8 (b) (1) (A) and (2) of that Act (R. 34). After the usual proceedings the Trial Examiner issued his Intermediate Report dismissing the complaint in its entirety (R. 34-48). The Trial Examiner pointed out that the General Counsel had neither alleged nor defined the appropriate unit on August 30, 1957 (R. 40) and that "the record provides no reasonable basis for other than a number of speculative possibilities, both as to what an appropriate unit was on August 30, 1957, and as to precisely how many employees were properly to be counted within any or all of these possible units" (R. 44). The Trial Examiner also found that "all" of the evidence "leads to the reasonable conclusion that both parties were acting in good faith on August 30: the Union in claiming majority, and the Employer in accepting the claim" (R. 43) and that "the Employer and the Union entered into the August 30 memorandum of understanding in good faith" (R. 44).

Upon exceptions filed by the General Counsel, the Board held that it was not necessary to determine what the appropriate unit was on August 30, 1957 nor how many employees were in the unit on that date (R. 10-12), because judged by the standards of the unit which the parties agreed upon in their October 10, 1957 contract, however employees in that unit were counted on August 30, 1957, and however union membership cards were counted, the Union did not have a majority in that unit on August 30, 1957 (R. 10-13). The Board determined that, solely because of such assumed lack of majority, the Employer by entering

into the strike settlement with the Union on August 30, 1957 interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) and contributed support to the Union in violation of Section 8 (a) (2) of the Act (R. 12-13) and the Union restrained and coerced employees in volation of Section 8 (b) (1) (A) of the Act (R. 13-14).[4] The Board ruled that the good faith of the Employer and the Union was immaterial (R. 10, 12).

As a remedy for these unfair labor practices the Board entered an order directing the Employer and the Union to cease and desist from the unfair labor practices found (R. 17-21). The Employer was also ordered to cease giving effect to the "memorandum of understanding" dated August 30, 1957 and to the collective bargaining agreement executed October 10, 1957, to cease and desist from recognizing the Union "as the representative of any of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment" and to withdraw and withhold recognition from the Union as the exclusive bargaining representative of its employees until the Union shall have won a Board-conducted election (R. 18-19). With respect to the Union, while the Board in stating what remedy it regarded as necessary, announced that it would order the Union to cease and desist from acting as the "collective bargaining representative of any of the Company's employees unless and until" it won a Board election (R. 16-17),

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[4] There were no other acts of unfair labor practices found. All allegations of individual acts of coercion were dismissed (R. 15-16, 46-48). The violations were thus based entirely on the act of recognition and execution of the agreements (R. 15-16).

the order by its terms was narrower in that the Union was ordered to cease and desist from acting as the "exclusive bargaining representative" until it shall have won a Board-conducted election and to cease giving effect to the "memorandum of understanding" of August 30, 1957 and the collective bargaining agreement executed October 10, 1957 (R. 20). The Board however stated in its decision that nothing therein should be construed as requiring the Employer to vary any wage, hour, seniority, or other substantive feature of its relations with its employees which the Employer has established in performance of its contracts with the Union (R. 16-17), or "prejudice the assertion by employees of any rights they may have thereunder" (R. 16-18).

Board Member John H. Fanning dissented from the finding of the majority of the Board "that the Union's acceptance of recognition by the Employer in a contract establishing higher wages and better working conditions for the employees constitutes restraint or coercion of these employees within the meaning of Section 8 (b) (1) (A)" (R. 23). Relying upon his earlier expressed disagreement with the majority of the Board in the case of *Curtis Brothers, Inc.*, 119 N.L.R.B. 232, which dissenting views were adopted by this Court in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, Board Member Fanning stated that if picketing or a strike for recognition by a minority union did not violate Section 8 (b) (1) (A) of the Act, neither could an "employer's *voluntary recognition* of a minority union impose upon that union an unfair labor practice solely on the ground that it *accepted* recognition" (R. 24-25). (Italics Board Member Fanning's.) Board Member Fanning concluded (R. 25-26):

> "Here was a union that fought hard to secure substantial benefits from a reluctant employer *in a contract that did not require any employee to be or become a member of the Union.* * * * It seems to me the majority tilts at windmills in holding that the bona fide attempt of a minority union to secure substantial benefits for employees through collective bargaining amounts to unlawful restraint or coercion. I see no wrong doing here and would not fashion an unfair labor practice out of mere error in statistics." (Italics Board Member Fanning's.)

Upon petition by the Union filed in the court below to review and set aside the Board's order, the court below by a two to one decision, with Circuit Judge Charles Fahy dissenting, directed enforcement (Appendices C and D, pp. 11a-22a, *infra*). The majority of the court below distinguished this Court's decision in the *Curtis* case (*N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274), stating (Appendix C, *infra*, pp. 18a-19a):

> "In the instant case the recognition of the minority union is a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative. In the *Curtis Bros.* case the issue was not whether the recognition of the minority union as the exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of Section (8 (b) (1) (A).
>
> "The instant cases do not involve picketing and do not involve either the right of free expression or the right to strike which are protected by Section 13 of the Act. * * * The practices involved here, unlike recognitional and organizational picketing, are not specifically limited in the other unfair labor practice provisions of §8."

Circuit Judge Charles Fahy deemed that the decisions of the Court in the *Curtis* case and in *United Rubber Workers* v. *N.L.R.B.*, 362 U.S. 329 were dispositive of the case and required that the Board's order be set aside in its entirety. Referring to the *Curtis* case, Circuit Judge Fahy stated (Appendix D, *infra*, p. 21a):

> "In the absence of an objective explicitly condemned by the Act, such as appears in section 8 (b) (4), peaceful economic measures were held not to constitute such restraint or coercion of employees in the exercise of their rights guaranteed by section 7 as to constitute unfair labor practices within the meaning of section 8 (b) (1) (A). From this it seems to me to follow that the obtaining of such recognition by peaceful economic measures, unaccompanied by any unlawful contractual provisions, is not an unfair labor practice on the part of the union under section 8 (b) (1) (A). * * *
>
> "I believe it also follows that the employer on his part does not violate section (8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement."

The court below on May 19, 1960, entered a judgment enforcing the Board's order in full (Appendix B, *infra*, p. 10a).

REASONS FOR GRANTING THE WRIT

1. The decision below fails to follow the applicable principles of law enunciated by the Court in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, commonly known as the *Curtis* case, and in *United Rubber Workers* v. *N.L.R.B.*, 362 U.S. 274. This Court's holding that Section 8 (b) (1) (A) does not bar strikes or picketing for recognition of a minority union must necessarily

mean that this section does not bar peaceful acceptance of recognition by a minority union. This Court in the *Curtis* case reached its decision by examining the legislative history of Section 8 (b) (1) (A) and determining that the objectives which Congress had in mind in enacting this section did not encompass such a result as barring peaceful measures taken by a minority union to achieve recognition. This Court there said (362 U.S. at p. 290):

> " * * * Section 8 (b) (1) (A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof. * * *"

A peaceful request of a union for recognition followed by the signing of a contract when the employer agrees to grant recognition can by no stretch of the imagination be classified as "violence, intimidation, and reprisal or threats thereof." If anything, such claim making and contract signing are much further removed from the type of conduct to which Section 8 (b) (1) (A) is directed than are strikes and picketing for recognition.

This Court in its decision in the *Curtis* case listed various Board decisions during the first decade after the passage of the Taft-Hartley Act, which gave Section 8 (b) (1) (A) the "limited application" which this Court characterized as "a sounder construction" of Section 8 (b) (1) (A) than the Board's construction in the *Curtis* case (362 U.S. at 290-291). In one of the cases so cited by this Court, *Miami Copper Co.*, 1950, 92 N.L.R.B. 322, 324, the Board dismissed a complaint alleging that a minority union had violated Section 8 (b) (1) (A) by striking and compelling the employer to deal with it in the adjustment of griev-

ances in derogation of the rights of the majority union. The Trial Examiner in the *Miami Copper* case found that the employer violated Section 8 (a) (1) and (5) by dealing with the minority union. The Board sustained this finding without passing on its validity solely because the employer failed to file exceptions (92 N.L.R.B. at 324). In dismissing the Section 8 (b) (1) (A) allegations the Board said (92 N.L.R.B. at 324):

> "Where the union's conduct involved violence, threats thereof, or related conduct, or where the union had obtained or was attempting to obtain economic discrimination against particular employees, we have found such conduct proscribed by Section 8 (b) (1) (A). No such factors are present here. Standing alone, the fact that the Union's conduct caused the Employer to violate a statutory right of the employees is not sufficient, in our opinion, to bring that conduct within the limitations which the legislative history requires we place on Section 8 (b) (1) (A)."

The decision below is inconsistent with this Court's approval of the Board's construction of Section 8 (b) (1) (A) in the *Miami Copper* case.

Prior to the enactment of the Wagner Act, employers and unions had been free to enter into collective bargaining contracts without any requirement that the union have been designated by a majority of the employees. The Wagner Act was directed solely at extending labor's rights. While it required an employer to bargain with the union designated by the majority, it contained no restraint on arm's length bargaining between an employer and a union with less than a majority. The legislative history of Section 2 (9) of that Act, which in this regard still remains

unchanged, and which defines a labor dispute to include controversies concerning the negotiating or fixing of terms or conditions of employment "regardless of whether the disputants stand in the proximate relation of employer and employee," shows congressional approval of minority union recognition.[5]

In the cases decided under the Wagner Act, many of the strikers whom the Board ordered reinstated had been participants in strikes conducted by minority unions seeking recognition. *E.g., Cleveland Worsted Mills Co.*, 1942, 42 N.L.R.B. 545. In *Black Diamond S.S. Corp. v. N.L.R.B.*, 2 Cir., 1938, 94 F. 2d 875, certiorari denied, 304 U.S. 579, while an election was being held by the Board to determine which of two rival unions represented a majority of the men, one of the unions demanded that the company bargain with it. The demand was ignored and the union called a strike. The court held that the men had a right to strike and that the strike did not prejudice their right to rein-

[5] In House Report No. 1147, 74th Cong., 1st Sess., pp. 9-10 (II Leg. His. N.L.R.A., 1935, pp. 3056-3057), on the original Wagner Act, the discussion of the definitions set forth in Section 2(3) and (9) states: "The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee * * *." The committee then proceeded to cite *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209, thus indicating an intent to guarantee the right of minority unions to picket for the purpose of changing wages and working conditions. The *American Steel Foundries Case* involved a Trades Council which represented less than a majority of the employees. The Council sought negotiations with the employer after wages were cut from 2 cents to 10 cents per hour. The manager of the company responded that he "did not recognize organized labor and would not deal with the committee * * *" (257 U.S. 196). Thereupon the Council called a strike and picketed the company.

statement. See also to the same effect *Columbia Pictures Corp.*, 1945, 64 N.L.R.B. 490, 510-515. In no case decided under the Wagner Act did the Board or the courts find that such an objective made the conduct of the strikers illegal[*] or that an employer, in the absence of a rival union, or other employer favoritism, committed an unfair labor practice by recognizing a minority union and bargaining with it at arm's length. Nor have we been able to find in the legislative history of the Taft-Hartley Act, which in this regard was fully reviewed by this Court in the *Curtis* case, any indication that Congress by its enactment of Section 8 (b) (1) (A) intended to deal with this problem.

In the instant case both Board Member Fanning (R. 23-27) and Circuit Judge Fahy (Appendix D, p. 21a) pointed out that a construction of Section 8 (b) (1) (A) as not directed at peaceful economic measures, such as was adopted by this Court in the *Curtis* case, precludes a finding such as the Board made here, that recognition of a minority union violates Section 8 (b) (1) (A) of the Act. Moreover as Circuit Judge Fahy stated (Appendix D, *infra*, pp. 21a-22a), the holding by this Court that a strike and picketing for recognition of a minority union does not restrain and coerce employees in the exercise of their rights guaranteed by Section 7, makes it equally impossible to find that an employer by according such recognition violated either Section 8 (a) (1) or (2) of the Act.

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[*] In *N.L.R.B.* v. *Brashear Freight Lines, Inc.*, 8th Cir., 1941, 119 F. 2d 379, 382, the court however found no basis for reinstating such strikers where the employer had not committed any unfair labor practices which provoked the strike and had not been guilty of discrimination in failure to rehire the strikers. The court did not explain its reasoning.

Circuit Judge Fahy was General Counsel of the National Labor Relations Board from its inception in 1935 until 1940 when he resigned and shortly thereafter became first Assistant Solicitor General of the United States, and later Solicitor General of the United States. In all of these capacities, as well as in his capacity as a judge of the United States Court of Appeals for the District of Columbia Circuit, Circuit Judge Fahy has had a very close association with the interpretation and administration of the National Labor Relations Act. His view that neither the union nor the employer was here guilty of any unfair labor practice is entitled to great weight.

This Court should review the decision below in order to correct the failure to follow the decisions of this Court in the *Curtis* and *Rubber Workers* cases.

2. The issue presented is of far reaching importance to industry and labor. There are more than 150,000 collective bargaining contracts currently in effect in the United States, according to the most recent estimates of the Bureau of Labor Statistics.[7] It is safe to state that only a small fraction[8] of these are with

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[7] BLS Bull. No. 1267, Directory of National and International Labor Unions in the United States, 1959 (G.P.O. December 1959), p. 15.

[8] The Statistical Analysis Branch of the National Labor Relations Board keeps cumulative statistics on the number of unions which have won Board conducted elections and has supplied us with the information that from the inception of the Board in 1935 through June 30, 1959, there were 72,336 Board conducted elections won by unions. Neither the Board nor the Department of Labor has any figures as to how many of these elections were won by the same union year after year nor how many unions in all are today certified nor how many contracts are with certified unions. The vast bulk of these 72,336 elections were conducted many years ago and the certifications issued therein are now obsolete.

certified unions. Employers and uncertified unions will in the future be hesitant to enter into collective bargaining agreements if their *bona fide* determination of union majority can be upset by the Board should they have made a mistake in the complicated process of determining inclusions and exclusions from the appropriate bargaining unit. Increased instability in labor relations must necessarily result if the more than a hundred thousand employers and union who are today parties to contracts where there is no certification should suddenly become aware of the possible consequences of renewing agreements without certification of the union. The decision below forces them to be certain not only of the union majority at the time of renewal but also that there was a union majority when the prior contract was signed, unless the events incident thereto have been barred by the statute of limitations. *Cf. Machinists Local* v. *N.L.R.B.*, 362 U.S. 411, 425-426.

Especially in strike situations, the decision below, if not reviewed and set aside, will make it difficult if not impossible to settle many strikes. The parties may not wish to resort to the election process and even if they wish to, the delays which attend petitions for Board conduct of elections would certainly greatly lengthen strikes should the parties be placed at their peril in signing a settlement agreement without Board certification.

Even where no strike was in progress, this Court has recognized that the policy of encouraging prompt signing of contracts in order to avoid strikes, is so strong, that the delay incident to waiting for a Board-conducted election should not be permitted in the absence of compelling reasons. In *Consolidated Edison Co.* v.

N.L.R.B., 1938, 305 U.S. 197, 237, in setting aside a Board order which invalidated contracts made with an uncertified union and holding that they should be permitted to continue in effect as members-only contracts, this Court said:

> "there is nothing to show that the employees' selection as indicated by the Brotherhood contracts had been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree . . . The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of the employees, would remove that salutary protection during the intervening period.
>
> "The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency . . . did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf."

The effect of the rule enunciated below to discourage collective bargaining has been described and discussed in a note on the Board's decision in this case entitled: Restraint and Coercion: Execution of a Collective Bargaining Contract by a Minority Union, 1959 Duke

Law Journ. 624, 627-629 (Fall 1959). The author of that note states (at pp. 627-628):

> "This decision also involves federal labor policy considerations which indicate that a different rule might be more desirable. It seems fair to say that the decision could have the effect of discouraging the signing of collective bargaining contracts because it required a union act therein at its peril, good faith being expressly excluded as a defense. A union may be faced with serious difficulty in ascertaining the exact number of employees in a bargaining unit. . . . Furthermore, should the employer be negligent in supplying the union with the correct number of employees in a bargaining unit from the payroll records, the union, under the rule in the instant decision must share the risk of committing an unfair labor practice.
>
> "All of these considerations may discourage unions from signing collective bargaining contracts because none of these circumstances would be considered a legitimate defense and because the necessity of making a determination of majority status would cause delay at the most critical point in negotiations—just prior to signing." (footnotes omitted)

The dilemma posed for employers and unions by the rule of the decision below is not soluble under present Board doctrine. At one time a union and an employer, faced with uncertainty as to the majority status of a union, could safely sign a members-only contract. Compare *Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U.S. 197, 236. But it is dubious if any members-only contract is ever valid under present Board doctrine. In *Max Factor & Co.*, 1957, 118 N.L.R.B. 808, 813, the Board pointed out that the General Counsel took the position that a members-only contract is *per se* violative of the Act. The Board there found it unnecessary

to pass on the issue, as the members-only contract there had been preceded by an unlawful union security contract. In its order, however, the Board did forbid recognition "even limited to its members" until the union should win a Board-conducted election.

It is today settled that a members-only contact with a majority union is illegal because it violates the duty of a majority union to represent all employees.[9] A members-only contract even with a minority union is illegal if it provides different benefits for union than for non-union members,[10] whereas the provisions in a contract, which recited it was for members only, of the same provisions for all employees, has been held to show that the contract was actually an exclusive recognition contract.[11]

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[9] See *N.L.R.B.* v. *Gaynor News Company, Inc.*, 2d Cir., 1953, 197 F. 2d 719, 722 where the court said: "The union here represented the majority of employees and was the exclusive bargaining agent for the plant. Accordingly, it could not betray the trust of non-union members by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation." This language was quoted with approval by this Court in affirming that decision, 347 U.S. 17, 37-38.

[10] *Newark Newsdealer Supply Co.*, 1951, 94 N.L.R.B. 1667, 1668-1669; Annotation: Unfair labor practices; discrimination between union members and non-members as to wage increases, vacations and the like, 41 ALR 2d 654, 655-656, § 2. In general; where union bargains for its members only; *Jandel Furs*, 1952, 100 N.L.R.B. 1390, 1392-1393; *Seaboard Terminal*, 1955, 114 N.L.R.B. 1391, 1396.

[11] *Herff Jones Co.*, 1952, 97 N.L.R.B. 1070, 1071-1072; *Sunbeam Corp.*, 1952, 99 N.L.R.B. 546; *Alco-Gravure, Division of Publications Corp.*, 124 N.L.R.B. No. 141, enforced by consent, 6th Cir., 1959, 45 LRRM 2899. For the limited validity which members-only contracts have been given by the Board, see *The Hoover Company*, 1950, 90 N.L.R.B. 1614, 1618; *Consolidated Builders, Inc.*, 1952, 99 N.L.R.B. 972; 17th NLRB Annual Report, 1952, p. 124.

This Court has repeatedly recognized that Congress intended to encourage employers and unions to enter into collective bargaining agreements without first having to come to the Board to have it determine a unit and conduct an election. *Cf. United Mine Workers* v. *Arkansas Oak Flooring Co.*, 1956, 351 U.S. 62, 74-75. Indeed, the Board and the courts have always held that any employer who had a *bona fide* belief in the union's majority committed an unfair labor practice by refusing to accord exclusive recognition and insisting on a Board-conducted election.[12] The employer may not even insist on proof of the union's majority, unless the employer has reason to doubt it. In *Automotive Supply Co.*, 1957, 119 N.L.R.B. 1074, 1094-1095, the Board held:

> "Respondent contended that the Union had a duty to prove its majority to the Company. This would be true only if the Company had any good faith doubt which it did not have."

We believe that bargaining without recourse to Board proceedings is in accordance with the policy of the statute to encourage collective bargaining. The instant case, however, is inconsistent. It prevents employees and unions from bargaining without risking either unfair labor practice charges or the delay involved in Board-conducted elections.

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[12] *United Butcher Abattoir, Inc.*, 1959, 123 N.L.R.B. 946, 957; *F. M. Reeves & Sons, Inc.*, 1958, 121 N.L.R.B. 1280; *Merchandiser Press, Inc.*, 1956, 115 N.L.R.B. 1441, 1448-1449; *H. Rothstein & Co., Inc.*, 1958, 120 N.L.R.B. 1556; *Top Mode Mfg. Co.*, 1952, 97 N.L.R.B. 1273, enforced, 3 Cir., 1953, 203 F. 2d 482; *N.L.R.B.* v. *W. T. Grant Co.*, 9th Cir., 1952, 199 F 2d 711, certiorari denied, 344 U.S. 928; *Joy Silk Mills, Inc.* v. *N.L.R.B.*, D.C. Cir. 1950, 185 F. 2d 732, 741, enforcing 85 N.L.R.B. 1263, 1264-1265, certiorari denied, 341 U.S. 914; *N.L.R.B.* v. *Idaho Egg Producers, Inc.*, 9th Cir., 1956, 229 F. 2d 821.

To make the validity of bargaining relationships depend upon the actual existence of a proveable majority, encourages employer trickery. To settle a strike, the employer can represent his payroll at a low figure and once the strike is settled, upset the settlement by revealing a larger number of employees in the unit. *Cf. Sierra Furniture Co.*, 1959, 123 N.L.R.B., 1198, 1211.

3. The settlement of strikes by genuine agreements providing increased wages and improved working conditions is beneficial to all employees whether union members or not. Where the employer has been fighting the union, and despite the employer's opposition, so many employees join the union that both employer and union believe the union has majority status, there can be no element of restraint or coercion of non-union employees. Nor in either the eyes of the employer or the employees is the recognition viewed as support to the Union. Rather it is nothing more than what the employer and the union believe is legally due. The grant of only what is legally due is not support. If the non-union employees are unhappy at being represented by the union and doubt its actual majority, they can petition the Board for decertification or join another union and have it file a petition for certification. There is no need to add the unfair labor practice procedures to those that any dissenting employee already has available under Section 9 of the Act to free himself of an unwanted representative. The failure of the law to treat as an unfair labor practice the conduct of either the employer or the union in executing an exclusive recognition contract, in the good faith but mistaken belief that the union had majority status, does not mean that the Board must treat the contract as a bar to an

election.[13] As Circuit Judge Fahy stated (Appendix D, *infra*, p. 22a):

> "My position does not mean that the recognition in the form given is protected should a majority of the employees at any time repudiate the union or choose another bargaining agent. On the contrary, any existing 'contract bar' policy or regulation of the Board is I think inapplicable to such a contract with a minority union, though made in such circumstances as are presented by this case."

Member Fanning, in his dissent in the instant case (R. 26-27) likewise emphasized the difference between Section 8 unfair labor practices and Section 9 procedures for selecting representatives:

> "Section 9 of the Act specifically provides methods and procedures whereby employees can select or *reject* any union asserting a claim to be, or established as, their bargaining representative. The resolution of representation cases is a matter entirely within the discretion of the Board. It is in this forum that an employer's recognition or nonrecognition of a particular union is subject to defeasance or affirmation. Where the Board is satisfied that a question concerning representation exists, the Statute does not recognize any contract as a restraint upon the right of employees to make a choice for bargaining purposes. In the instant case the employees were free at any time

[13] At an early date, the Board followed a policy that "contracts with a labor organization which did not represent a majority of the employees when made, are clearly no bar to elections." 7th N.L.R.B. Annual Report, 1942, p. 55. In *Stratbury Mfg. Co.*, 1939, 12 N.L.R.B. 618, 620-621, the Board ordered an election in a representation case, notwithstanding the existence of a contract, on a finding that the union did not have a majority on the date the contract was executed, although it later acquired a majority while the contract was in effect.

> to petition the Board for immediate decertification of the Union. The Board would then in its discretion decide whether or not the contract barred an election. A decision that the contract operated as an effective bar would, it is true, foreclose the holding of an immediate election, but this restraint upon the right of employees to quickly repudiate an unwanted representative would be imposed not by the Statute, not by the Union, *but by the Board itself.* I cannot agree that the operation of discretionary Board rules is sufficient to create an unfair labor practice where none would otherwise exist." (Italics Board Member Fanning's.)

In commenting on the decision of the Court of Appeals herein, the editors of the Bureau of National Affairs' Labor Relations Reporter (Minority Union's Execution of Contract As Unlawful Coercion Under Taft-Hartley Act, 46 BNA Analysis 17, 20, May 30, 1960) pointed up the significance of this case:

> "The adoption of the new Section 8 (b) (7) restrictions on recognition and organizational picketing left the NLRB with some effective weapons against minority-union picketing, despite the overturning of the Curtis doctrine. If the Board should succeed in maintaining the present Garment Workers rule, it will be able to place another curb on the activities of minority unions. It will be unlawful for such a union to execute a contract, even though it does nothing unlawful to obtain the contract, the contract contains no unlawful provisions, and the union believes in good faith that it represents a majority of the employees."

From any realistic view, no interference, restraint or coercion of employees nor support of a union inheres in the good faith but mistaken assumption of majority status. To manufacture some supposed injury to non-union members out of what occurred here is to give legal fiction precedence over reality.

4. Even if some technical violation of the Act occurred when the Employer granted the Union exclusive recognition when the latter did not actually have a majority at the time the strike was settled on August 30, 1957, this cannot justify setting aside the collective bargaining contract of October 10, 1957. This was an otherwise perfectly valid collective bargaining agreement executed at a time when the Union had unquestionably been designated by a majority. The majority cannot be held defective because of the exclusive recognition given the Union on August 30, 1957. But this is the only reason the Board set aside the contract. Exclusive recognition in no way serves to cause employees to join a union against their will in circumstances where, as here, it does not constitute an indication of employer preference.

The public policy in preserving stable collective bargaining relationships has been held so substantial as to outweigh any considerations which might otherwise indicate that the aid given a union by an illegal union security clause should be offset by withholding of recognition from a union until certified. See *N.L.R.B.* v. *Gaynor News Co.*, 2d. Cir., 1952, 197 F. 2d 719, 724, affirmed without consideration of this issue, 347 U.S. 17, 37, n. 35, where the court said:

> "The Board argues that the entire contract must be voided and collective bargaining relations suspended, or otherwise the union will 'be permitted to continue to enjoy a representative status strengthened by virtue of the illegal contract.' * * * we believe the remedy works out too harshly here. * * * We do not, however, think that the possible danger to employees of allowing some collective bargaining relations with this union outweighs the substantial harm to them in taking away for an indefinite period all collective bargaining rights. We have therefore decided to re-

> fuse to enforce those parts of the Board's order which prohibit any contractual relations between the employer and this or any other union until such time as the Board gets around to considering and making a decision on this or any other union's petition for certification."

Similarly in *Puerto Rico S.S. Ass'n* v. *N.L.R.B.*, D.C. Cir., 1960, 46 L.R.R.M. 2496, 2498, the court refused to set aside an entire contract solely because of an illegal preferential hiring clause The court stated:

> "Having in mind the nature of the violation, and in the absence of any proof of conduct under the clause in question, we see no rational basis for the remedy ordered by the board. Nor do we see how it could effectuate the policies and purpose of the Act to destroy a contractual relationship which has resulted in labor peace of a number of years. There is no competing union in the picture; there are no inequities shown; and enforcement of the order would result in there being a considerable period of time while an election is being arranged and held, during which period the employees would be working without a contract and would have no bargaining representative to handle such matters as grievances. We believe that enforcement of this portion of the order would not aid in the maintenance and promotion of industrial peace and would not aid in the 'healthy policy of promoting production and employment.'"

In the instant case the Board order is so broad as to bar the employer from dealing with the Union even as the representative of its own members in such matters as grievances pending the establishment of its majority in an election (R. 16-18). If any order at all is indicated, certainly by acceptable standards the order here is much broader than can be justified. As indicated by the above court cases modifying Board orders which

upset collective bargaining contracts because of unfair labor practices not of such a character as to vitiate the whole contract, the imposition of such orders by the Board is not limited to this case and should be corrected by this Court. These orders indicate the same narrow restrictive approach to collective bargaining as is apparent in the finding that the Employer and the Union committed unfair labor practices by making an arithmetical error when they agreed to cease their former hostility and to sign a collective bargaining agreement.

All considerations of sound labor policy require that this Court review the decision below and put an end to the gross misinterpretation of the National Labor Relations Act which is adopted in that decision.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to review the decision below.

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APPENDIX

APPENDIX A

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*), as of 1957, at the time the unfair practices found allegedly were committed, are as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing dimunition of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of com-

merce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"SEC. 2. When used in this Act—

* * * * * * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this Act explicitly states otherwise, and shall include any individual whose work

has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * *

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section (8) (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not

be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section (8) (a) of the Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made * * * ; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9 (a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * * *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees

whom such employer is required to recognize under this Act;

* * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * *

"REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall

not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by the employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

* * * * *

"(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision

within which, in the preceding twelve-month period, a valid election shall have been held.

* * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. * * *

* * * * *

"(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

APPENDIX B

Judgment of the United States Court of Appeals for the District of Columbia Circuit Filed May 19, 1960

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,038 September Term, 1959

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 15,079 September Term, 1959

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BERNHARD-ALTMANN TEXAS CORPORATION, *Respondent*.

On Petition to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: Mr. Justice Burton, retired, and Wilbur K. Miller and Fahy, Circuit Judges.

Judgment

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered by this court that the petition of International Ladies' Garment Workers' Union to set aside the order of the National Labor Relations Board is denied; and the order of the National Labor Relations Board will be enforced in full.

Pursuant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion and judgment of this court.

PER MR. JUSTICE BURTON.

Dated: May 19, 1960.

Separate dissenting opinion by Circuit Judge Fahy.

APPENDIX C

Opinion of the United States Court of Appeals for the District of Columbia Circuit

On Petition to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board

Decided May 19, 1960

Mr. Charles J. Morris, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of Court, with whom *Messrs. Morris P. Glushien* and *L. N. D. Wells, Jr.*, were on the brief, for petitioner in No. 15038.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, with whom *Messrs. Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Herman M. Levy*, Attorney, National Labor Relations Board, were on the brief for respondent in No. 15038 and petitioner in No. 15079.

Mr. Wallace M. Cohen entered an appearance for respondent in No. 15079.

Before MR. JUSTICE BURTON, retired,* and WILBUR K. MILLER and FAHY, *Circuit Judges*.

Mr. Justice Burton: These cases present the question whether it was an unfair labor practice, under §§ 8 (a)(1) and (2) and 8 (b)(1)(A) of the National Labor Relations Act, as amended in 1947,[1] for an employer and a union

* Sitting by designation pursuant to 28 U.S.C. § 294 (a).

[1] "SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or

to enter into a collective-bargaining agreement recognizing the union as the exclusive bargaining representative of all of the employees in the proposed bargaining unit, although the union had not been authorized to act as their collective-bargaining representative by a majority of the employees. For the reasons hereafter stated, we are of the opinion that such an agreement unlawfully restrained nonparticipating employees from their free exercise of the rights of self-organization guaranteed to them by § 7 of the Act[2] and also gave unlawful support to the participating union. We therefore agree with the National Labor Relations Board's decision that such conduct in the cases before us was an unfair labor practice which the Board properly ordered discontinued.

The General Counsel for the National Labor Relations Board filed a complaint against the Bernhard-Altmann Texas Corporation, an employer, manufacturing knitwear for interstate commerce at San Antonio, Texas. The com-

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administration of any labor organization or contribute financial or other support to it . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." 61 Stat. 140, 141, 29 U.S.C. § 159 (a)(1) and (2), and (b)(1)(A).

[2] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)." 61 Stat. 140, 29 U.S.C. § 157.

plaint charged the employer with entering into an exclusive recognition agreement with the International Ladies' Garment Workers' Union, AFL-CIO, at a time when the union did not represent a majority of the corporation's employees in any appropriate bargaining unit. It also charged the employer with thus contributing to the support of the union in violation of § 8 (a)(2), and with interfering with the free exercise of rights, guaranteed to the employees by § 7 of such Act, in violation of § 8(a)(1). In a separate complaint the General Counsel also charged that the union had violated § 8 (b)(1)(A) by entering into the above-mentioned agreement with the employer and thus restraining and coercing some of the latter's employees in the free exercise of rights guaranteed to them by § 7. After a hearing in which the cases were consolidated, the trial examiner issued an intermediate report recommending that each complaint be dismissed in its entirety. However, the Board, on exceptions filed by the General Counsel, disagreed with the trial examiner's conclusions. The Board found that the employer and the union had respectively engaged in the alleged unfair labor practices. It accordingly ordered each of them to cease and desist from such practices and to hold a representative election. One member concurred in part and dissented in part. 122 N.L.R.B. 1289, 1297. The union now asks this Court to set aside the Board's order, whereas the Board asks that its order be enforced. Except for filing its answer, the employer has not participated in these proceedings.

The facts found by the Board are supported by substantial evidence on the record considered as a whole and are conclusive here. 61 Stat. 148, 29 U.S.C. § 160(e). Our jurisdiction is not questioned.

Beginning in 1956, the union engaged in a campaign to organize the employer's plant. It obtained a substantial number of authorization cards signed by employees desig-

nating the union as their bargaining representative. In July 1957, a number of the employees struck in protest against a wage reduction and the union, on behalf of some of the strikers, endeavored to settle the controversy. On August 30, 1957, during these negotiations, a "memorandum of understanding" was signed by the employer and the union. In that memorandum the employer expressly recognized the union as the exclusive bargaining agent for its production and shipping employees, and the union stated that it had been designated by a majority of such production and shipping employees to act as the exclusive bargaining representative of all of such employees. There was testimony that the union maintained a running check of the number of authorization cards it held against a list of the employees believed by it to be working in the bargaining unit. When the union's Regional Director became convinced that the union had obtained cards from a majority of the workers in the unit, he so stated to the employer. The latter made no independent check of the cards and took no other steps to investigate the assertion. Likewise, there is no evidence that at the time of conconcluding the agreement the union attempted to obtain a definitive list of the employees within the proposed bargaining unit.

In October 1957, the memorandum was followed by a formal collective-bargaining agreement. This covered many subjects appropriate for such a contract and recited that a majority of the employees in the bargaining unit had designated the union as their exclusive bargaining representative. The Board found that, on the critical date of August 30, the union had not been designated as a bargaining agent, either by the votes or by the signed cards of a majority of the employees in an appropriate bargaining unit. The union disputes the Board's finding of lack of majority status on August 30. While there were questions raised as to the status of some employees, the Board was justified in the finding that the union did

not represent a majority of the employees in the designated unit on the critical date.[3]

The intent of the National Labor Relations Act, as amended, and especially of § 7, is that the decision whether or not to be represented by a bargaining representative and also the choice of that representative shall be the uncoerced decision of a majority of the employees in an appropriate unit. Obstruction of that freedom of choice, by either the employer or the union, deprives some of the employees of this guaranteed right and is an unfair labor practice under § 8. It is difficult to conceive of a clearer restraint on the employees' right of self-organization than for their employer to enter into a collective-bargaining agreement with a minority of the employees. If upheld, that action would foreclose any other choice of a bargaining representative by a majority of the workers in the unit. It would not only impose the minority's bargaining agent upon the nonparticipating majority, it would also practically preclude the majority, during the term of the contract, from casting off the union as bargaining representative. Even if the employees might surmount the difficulties inherent in challenging the established order by presenting a petition for decertification under § 9 (c),[4]

[3] The union contends that although the August 30 memorandum may be invalid, the formal contract executed in October when the union had achieved majority status is valid. The fact that, by October, the union may have achieved a majority status during the period that it maintained an unlawful agreement is irrelevant. *Local Lodge 1424* v. *N.L.R.B.*, 362 U.S. 411, 414, *reversing on other grounds* 105 App. D.C. 102, 107, 264 F. 2d 575, 580 (1959). See *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 703-705 (1944), and *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 372, 185 F. 2d 732, 744 (1950), cert. den., 341 U.S. 914 (1951).

[4] See *N.L.R.B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 267 (1938). "It [Congress in passing the NLRA] had before it the *Railway Clerks* case which had emphasized the importance of union recognition in securing collective bargaining . . . and there

it is quite likely, under the Board's decisions, that the "contract-bar" rule would prevent the majority from asserting the union's lack of majority status during the two-year term of the contract. It has been held repeatedly by the Board that in a decertification proceeding, where the contract bar has been asserted, the petitioners are not permitted to show the lack of majority status of the union at the time the contract was made.[5]

It has been repeatedly found an unfair labor practice under § 8(a)(1) and (2) for an employer to conclude a collective-bargaining agreement with a minority union.[6] In most of these cases there were aggravating factors such as the presence of a rival union or the imposition of a union security provision, but those cases do not appear to turn on the presence of these aggravating factors, nor are these factors always present. We see no material

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were then available *data showing that once* an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of the employees, and hence in preventing the recognition of any other."

[5] See *In re Columbia River Salmon & Tuna Packers Assn.*, 91 N.L.R.B. 1424 (1950); *In re Electro Metallurgical Co.*, 72 N.L.R.B. 1396 (1947); *Sport Girl Co.*, 26 LRR Man. 1284 (1950); *In re Wilmington Terminal Warehouse Co.*, 68 N.L.R.B. 299, 302 (1946).

[6] See *e.g.*, *Dixie Bedding Mfg. Co.* v. *N.L.R.B.*, 268 F. 2d 901, 905 (C.A. 5th Cir. 1959); *District 50, United Mine Workers* v. *N.L.R.B.*, 234 F. 2d 565, 569 (C.A. 4th Cir. 1956); *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2d Cir. 1954); *N.L.R.B.* v. *Gottfried Baking Co.*, 210 F. 2d 772, 782 (C.A. 2d Cir. 1954); *Elastic Stop Nut Corp.* v. *N.L.R.B.*, 142 F. 2d 371, 379-380 (C.A. 8th Cir. 1944), cert. den., 323 U.S. 722; *United Transports, Inc.*, CCH Lab. Law Rep. (4th ed. 1959) ¶ 56,192 (123 N.L.R.B. No. 60); *Grand Union Co.*, 122 N.L.R.B. 589; *Coast Aluminum Co.*, 120 N.L.R.B. 1326 (1958); *R. B. Wyatt Mfg. Co.*, 117 N.L.R.B. 700 (1957), aff'd *sub. nom. N.L.R.B.* v. *Steel, Metals, Alloys, Local 810*, 253 F. 2d 832 (A. 2d 1958); *International Metal Products Co.*, 104 N.L.R.B. 1076, 1077 (1953); *John B. Shriver Co.*, 103 N.L.R.B. 23 (1953); *In re Ken-Rad Tube & Lamp Corp.*, 62 N.L.R.B. 21 (1945).

distinction from the viewpoint of the employees' § 7 organizational rights between the rival union situation, where there is interference in the choice between bargaining agents, and the instant cases, where the interference affects the choice whether to bargain through a collective representative or individually.

As early as *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937), it has been recognized that implicit in the duty of the employer to recognize the majority's representative of his employees as the exclusive bargaining representative is the correlative duty to deal with no agent other than that chosen by the majority.[7] Also implicit is the obligation on the part of the employer to make sure that the representative does in fact represent a majority of the employees. Conversely, it is the duty of those who seek to establish themselves as exclusive bargaining agents to make sure that they have the mandate of those in whose name they speak.

Section 8 (b)(1)(A), as enacted in 1947, prohibits unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8 (a)(1). That the provisions were intended to be parallel is indicated by the similarity of the language employed, and is confirmed by the legislative history of the provisions.[8]

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[7] See *North Electric Mfg. Co.* v. *N.L.R.B.*, 123 F. 2d 887, 889-890 (C.A. 6th Cir. 1941), cert. den., 315 U.S. 818 (1942); *Texarkana Bus Co.* v. *N.L.R.B.*, 119 F. 2d 480, 484 (C.A. 8th Cir. 1941); *N.L.R.B.* v. *Union Pacific Stages, Inc.*, 99 F. 2d 153, 159 (C.A. 9th Cir. 1938); S. Rep. No. 573, 74th Cong., 1st Sess. 13 (1935).

[8] For expressions of intent that the two provisions establish comparable standards for employer and union conduct to those established for employer conduct by § 8 (1) see *e.g.*, the views of Senators Taft, Ball, Donnell and Jenner, S. Rep. No. 105, 80th Cong., 1st Sess. 50 (1947); statement of Senator Ball upon introducing § 8 (b)(1)(A) as an amendment, 93 Cong. Rec. 4016, and Senator Ball's further statements during debate, *id.*, at 4432-4433; Senator Taft in debate, *id.*, at 4025, 4436; remarks of Senator Smith, *id.*, at 4435.

Section 8 (a)(1), as it appeared in the original Wagner Act as § 8 (1), applied only to employer conduct. The major purpose which the sponsors of the 1947 amendments sought to achieve was to impose on unions the same restrictions as those imposed by § 8 (1) on employers respecting intrusion on protected employee activity. The omission of the word "interference" from subsection (b)(1) may not be devoid of significance when considering whether labor organizations are permitted wider latitude in peacefully persuading employees to organize than is permitted employers in opposing collective bargaining. But where union activities go beyond the level of persuasion and amount to a foreclosure of the exercise of § 7 rights by the employees, we find no basis for holding that the provisions should have a different meaning when applied to a labor organization than when applied to an employer.

This Court's decision in *Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros.)* v. *N.L.R.B.*, —— U.S. App. D.C. ——, —— F.2d ——, decided November 26, 1958, and the Supreme Court's affirmance of that decision, 362 U.S. 274, do not militate against enforcement of the Board's order in the instant cases.[9] In the *Curtis Bros.* case a minority union was engaged in peaceful picketing in an effort to secure the recognition of a union which recently had been defeated in a certification election. This Court held that such picketing was not an unfair labor practice. The instant cases involve much more direct interference and restraint of § 7 right than did the *Curtis Bros.* case. In the instant cases the recognition of the minority union is a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their

[9] Since its decision in *Curtis Bros.* the Supreme Court has assumed in *Local Lodge 1424* v. *N.L.R.B.*, 362 U.S. 411, that the conclusion of a collective-bargaining agreement by a minority union may be an unfair labor practice. See *id.*, at 414 and dissenting opinions at 429, 433.

own representative. In the *Curtis Bros.* case the issue was not whether the recognition of the minority union as the exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of § 8(b)(1)(A).

The instant cases do not involve picketing and do not involve either the right of free expression or the right to strike which are protected by § 13 of the Act.[10] *Teamsters Union* v. *Vogt, Inc.*, 354 U.S. 284 (1957); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The practices involved here, unlike recognitional and organizational picketing, are not specifically limited in the other unfair labor practice provisions of § 8.

An employer need not bargain with an uncertified representative if he has grounds in good faith for doubting the union's majority status,[11] but he is under a duty to bargain if he has adequate grounds for believing that the union does represent a majority.[12] It is difficult to establish ground for believing or disbelieving the existence of a majority status for a union in the face of a failure to take any steps to determine that status.[13]

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[10] 61 Stat. 151.

[11] *Mount Hope Finishing Co.* v. *N.L.R.B.*, 211 F. 2d 365, 373 (C.A. 4th Cir. 1954); *A. L. Gilbert Co.*, 110 N.L.R.B. 2067 (1954); Administrative Decisions of the General Counsel, 5 CCH Lab. Law Rep. ¶¶ 56,470, 56,537, 56,548 (1959). The rule is otherwise where a labor organization has recently been certified by the National Labor Relations Board. *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954).

[12] *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 369, 185 F. 2d 732, 741 (1950), cert. den., 341 U.S. 914 (1951).

[13] Failure to investigate a union's majority claim and bargain if it is substantiated is an unfair labor practice. *N.L.R.B.* v. *Inter-City Adv. Co.*, 190 F. 2d 420 (C.A. 4th Cir. 1951), cert. den., 342 U.S. 908 (1952); *N.L.R.B.* v. *Crown Can Co.*, 138 F. 2d 263 (C.A. 8th Cir. 1943), cert. den., 321 U.S. 769 (1944); *In re Metal Textile Corp. of Delaware*, 47 N.L.R.B. 743, 753 (1943).

The central consideration here is not merely whether the employer or the union entertained a bona fide belief that the union had majority support, but whether that belief was arrived at through an adequate effort to determine the true facts of the situation.

Questions may arise as to the membership of particular employees in the bargaining unit or the validity of the union authorizations. In most of these situations clear and convincing proof of the employees' status will be readily available to the parties in the form of personnel records and other direct proof of employment status. If informal methods are not available, or they do not prove dispositive, § 9 (c) provides a formal method for an authoritative Board determination of majority representative status.

Organizational efforts will not generally turn on such thin majorities as to require a complex computation of majority status. In such a case, simple procedures are available to demonstrate majority status. It is only when the question is close that more is required. If the parties' determination of majority status is questionable, the burden is on the General Counsel to establish the alleged unfair practice and lack of majority status.

The net effect of the Board's policy is to require that labor organizations and employers refrain from recognizing by agreement a sole bargaining representative until such time as they have adequately established that such agent represents a majority of the employees in the bargaining unit. Allowing the union or the employer to do otherwise would permit them, by agreement, to undermine the employees' rights under § 7.

Accordingly, the union's petition to set aside the order is denied and the Board's order shall be enforced in full.

APPENDIX D

Dissenting Opinion of Circuit Judge Charles Fahy

FAHY, *Circuit Judge, dissenting*: The doubts which surrounded the problem presented by this case have been resolved, as it seems to me, by the necessary implications of the recent decisions of the Supreme Court in *NLRB* v. *Drivers Chauffeurs, Helpers, Local 639*, 362 U.S. 274, referred to as the *Curtis* case, and *United Rubber Workers* v. *NLRB*, 362 U.S. 329. The Court held in these cases that peaceful picketing, or a peaceful strike, by a union which did not represent a majority of the employees, to obtain immediate recognition as the exclusive bargaining agent in *Curtis*, or to obtain a contract in *United Rubber Workers*, was not an unfair labor practice under section 8(b)(1)(A) of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §§ 141-66 (1958). The subject was exhaustively considered in *Curtis*. In the absence of an objective explicitly condemned by the Act, such as appears in section 8(b)(4), peaceful economic measures were held not to constitute such restraint or coercion of employees in the exercise of their rights guaranteed by section 7 as to constitute unfair labor practices within the meaning of section 8(b)(1)(A). From this it seems to me to follow that the obtaining of such recognition by peaceful economic measures, unaccompanied by any unlawful contractual provision, is not an unfair labor practice on the part of the union under section 8(b)(1)(A). Insofar, therefore, as the Board order rests upon recognition thus accorded I think it is not supported.

I believe it also follows that the employer on his part does not violate section 8(a)(1) or section 8(a)(2) by according such recognition or entering into such an agreement. There was no rival union competing for recognition. Moreover, the employer was not interfering with the freedom of the employees by conferring exclusive recognition in furtherance of the employer's own prefer-

ence for or desire to assist one union over another. Nor was the contract one for a union shop, see *Local Lodge No. 1424* v. *NLRB*, —— U.S. ——, (28 U.S. L. Week 4274, April 26, 1960), or claimed to be unlawful except that it accorded exclusive recognition to the union.[1] The strike was a peaceful one by the only union seeking recognition and bargaining status. The union lawfully obtained the settlement. It would frustrate the union's right so to do were it to be held that the employer, in agreeing to such a settlement, engaged on its part in an unfair labor practice which invalidated the settlement reached. Moreover, it seems to me that the contrary position requires an employer to suffer the consequences of a lawful strike without being able lawfully to bring it to an agreed end unless and until the union gains the adherence of a majority of the employees.

My position does not mean that the recognition in the form given is protected should a majority of the employees at any time repudiate the union or choose another bargaining agent. On the contrary, any existing "contract bar" policy or regulation of the Board is I think inapplicable to such a contract with a minority union, though made in such circumstances as are presented by this case.

I would set aside the order of the Board.

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[1] The Board decision does not rest to any extent upon any other provision in the contract. I treat the case on the same basis.